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No. 91-212

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

WESTERN PALM BEACH COUNTY FARM BUREAU, INC., ROTH FARMS, INC. and K.W.B. FARMS,

Petitioners,

v.

UNITED STATES OF AMERICA,

FLORIDA KEYS CITIZEN COALITION, FLORIDA WILDLIFE FEDERATION, ENVIRONMENTAL DEFENSE FUND, SIERRA CLUB, NATIONAL WILDLIFE FEDERATION, WILDERNESS SOCIETY, NATIONAL PARKS & CONSERVATION ASSOCIATION, and DEFENDERS OF WILDLIFE, FLORIDA AUDUBON SOCIETY,

SOUTH FLORIDA WATER MANAGEMENT DISTRICT and TIMER E. POWERS, its Interim Executive Director, FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION and CAROL M. BROWNER, its Secretary,

FLORIDA SUGAR CANE LEAGUE, INC., FLORIDA FRUIT and VEGETABLE ASSOCIATION, and BEARDSLEY FARMS, INC.

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY TO THE BRIEF IN OPPOSITION

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The reasons for granting the Writ are now apparent, the Solicitor General having contended that an obiter dictum by Justice Brennan (Brief p. 16) has already decided for the Court that in the phrase "Controversies to which the United States shall be a Party," and only there among its repetitions in Article III, the term Controversies embodies nothing of the plan of the convention as regards the States' responsibility for their own governments; and the district judge below having held on remand that 28 USC § 1345 alone suffices a United States claim to move a sector of State government to federal court and install the judge at its head. Sta R120-21.

On November 8 in Miami the federal judge whose only decisional referents are generally worded statutes that Florida enacted exclusively for its named agencies to interpret and implement in Florida's own administrative discipline, which excludes even Florida's own judiciary, will be asked by the United States to enforce those statutes by an Order creating a new Florida regulatory Code targeting farmers and taking their lands to create for a National Park and a federal Wildlife Refuge the exquisitely pure water that the federals want but cannot claim as of any right State or federal, by statute, contract, debt, tort or common law – let alone by Constitution.

The United States asks the district court (Sta R72) to approve an Agreement which is by title a Settlement but by terms a Surrender of Florida's own governance in this sector to the federal judge. Sta R4-71. "Turning over my sword" is how Governor Chiles described the affair on May 20, in open court. This, from one of the State long ago denominated with the United States as "each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to

the other." *M'Culloch v. Maryland*, 17 US (4 Wheat) 316, 400, 410 (1819).

"This move" of State governance to federal court, as the court of appeals described it,[1] is at once the object of the suit and the means for achieving the object: "Count I of the Complaint seeks to move a state administrative task – development of standards for implementing the broad commands of the SWIM Act – to federal court."

The two defendant Florida agencies, their resistance and resources exhausted by three marathon years of federal discovery (Sta R90) on the putative issue of how stringently and strategically their new Code then in preparation ought to regulate Floridians, have now capitulated to the superior litigating power. They have Agreed with the United States, subject to court approval, to adopt and enforce a massive new Code in particulars as Agreed. Sta R4-71.

The enterprise shall be continuing and the federal district judge shall be its supreme authority. Sta R29, 30, 33. A Technical Oversight Committee, mostly federal officers, shall report "technical" needs for Florida to promulgate new governmental stringencies and strategies against its citizens – any need, for example, to condemn more land than the 25,000 acres already Agreed, Sta R23, 26-27, 51-54, 60-61 – so that the Park may be supplied water abundant and purged of phosphorus down from the level of 240 parts per billion, expressly contracted for

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[1] *United States v. South Florida Water Management Dist.*, 922 F.2d 704, 709 n. 7 (11th Cir. 1991), A 11 n. 7 (e.a.). The court added, "If the state is not doing its job *and statutory authority supports federal proceedings, this move is legally proper.*" After raising this question, the court of appeals held that petitioners could not inquire as to the answer. Pet A23, 24, 26, 30. That gives rise to Question 1 in the Petition.

by the United States and Florida in 1984, to 14 parts per billion, maximum. Pet A54, 58, Sta R12.

This absorption of State government into federal court is not founded on any claim of right by Act of Congress, the Constitution, or judge-made law. The tissue claims sounding in contract have been abandoned: the contracts struck in earlier proprietary transactions[2] by these sovereigns are so remote from the Agreement that they are not even acknowledged by its Integration Clause. Sta R30. The tissue claim of common law nuisance was abandoned when a court of appeals judge asked an elementary question at oral argument.[3] The allegation which cooked a fragment of text from an Act of Congress to make it seem preemptive is also abandoned; its supposed mandate[4] is not mentioned by the Motion in

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[2] Controversies over "duly authorized proprietary transactions" entitle "the United States to seek legal redress" in a federal court. *E.g., United States v. Little Lake Misere Land Co., Inc.*, 412 US 580, 593 (1973). Counts III and IV sounding in contract composed nonexistent State promises for the texts of two earlier contracts, Pet A47-50, A54-72, Pet p. 10-11, and alleged as breach that the State had not adopted the Code sought directly by Count I. It was not alleged that Florida breached any promise it *did* make.

[3] 922 F.2d at 711 n. 10, Pet A17 n. 10: "There is some dispute as to whether the United States has a fifth count for common law nuisance lurking in its Amended Complaint. . . . The United States clarified in oral argument, however, that it is referring to Fla. Stat § 373.433, which declares acts in violation of the state's permit and water quality requirements to be a statutory nuisance. The nuisance claim, then, does not add a substantive count to the United States's other claims arising under state law.

[4] The nearest allegation of a federal statutory claim was a purported quotation from the Park's authorizing Act that "no

(Continued on following page)

reciting the laws supposedly fulfilled by this Agreement. Those tissue claims having eased the complaint through a risibility test for failure-to-state-a-claim,[5] they are now forgotten.

The United States Motion to Approve precisely identifies "the statutes and regulations the United States seeks in this litigation to enforce." Sta R84. All are Florida statutes and rules, all bespeak general policies in malleable terms, and all were promulgated for the derivation of effective meaning and strategic mission in Florida's unique administrative process, Chapter 120 Florida Statutes, whose chief distinction are the opportunities given an affected party "to change the agency's mind" by evidence and commentary by an independent hearing officer – whereby, perhaps, regulators can be moved from their normal condition of predisposed certitude, through a "sobering realization their policies lack convincing wisdom," to a Final Agency Action of greater integrity. The process was ably described by Professor Levinson's affidavit in support of the district court stay motion, Sta R107 et seq., and is elaborated by numerous Florida

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development of the project or plan . . . shall be undertaken which will interfere with preservation intact of the unique flora and fauna." Am. Comp. Pet A42. The deleted words were "for the entertainment of visitors." 16 USC § 410a.

[5] *See Kasper v. Board of Election Com'rs of City of Chicago*, 814 F.2d 332, 338 (7th Cir. 1987), describing "the risibility standard of *Hagans v. Lavine*," 415 US 528, 542-43 (1974): "[U]nless it is impossible to read the complaint with a straight face or the contention was recently and authoritatively rejected, there is federal jurisdiction even if the claim must fail on the merits."

judicial decisions in lineage from *McDonald v. Dept. of Banking and Finance,* 346 So.2d 569 (Fla. 1st DCA 1978).

The extraordinary writ of prohibition protects that process from judicial intrusion by Florida courts. *E.g., State ex rel. Dept. of General Serv. v. Willis,* 344 So.2d 580 (Fla. 1st DCA 1977).

That is Florida's self-government as prescribed by its laws. By "moving" such governance to federal court this litigation destroys that government. The court of appeals purported to substitute a "corresponding" and by implication equivalent "right to participate in the [federal] judicial proceedings," *United States v. South Florida Water Management Dist.*, 922 F.2d 704, 709 (11th Cir. 1991), Pet A 11 n. 7, which of course have now composed an Agreement in negotiations that entirely excluded petitioners.

The Brief in Opposition affects an understanding we contend, for petitioners, "that state-law claims by the United States may be brought only in state court because no state or federal statute clearly provides that such state-law claims may also be brought in federal courts." Brief in Opposition, p. 16. On the contrary, any State court suit of this sort, by anyone, would have been dismissed two years ago, if not at once.[6] What we protest to this Court is

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[6] A Florida statute not referenced by the complaint (Pet A34) or court of appeals Opinion, § 403.412 Florida Statutes, authorizes a limited action in a Florida circuit court (not a federal district court) by named parties (not the United States) to compel the undertaking of allegedly neglected regulatory action by a Florida agency. Pet A31. Such an action in a Florida court would not have survived the Water District's publication of a draft SWIM regulatory plan in August 1989. The court of appeals recognized also that the agency "is currently working on a final version." 922 F.2d at 708, Pet A9.

the federal judicial power subjugating Florida's government and performing its sovereign functions on no plausible claim of right except that the United States demands it.

2.

This Court in *Pennhurst* declared it "difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law."[7]

This affair stands for several more turns of that screw:

• Here the court will instruct the State officials on what regulatory Code they shall promulgate under State law, the sovereign's very composition of a governance text.

• Florida has committed its Codemaking to a distinctive governmental process that is treasured for affording citizens a real opportunity, and in time, to "change the agency's mind" by evidence on all issues of interpretation, policy and strategy, as well as of fact. Judges who are unpracticed in that distinctive State governance which they are asked to replace – the 11th Circuit alluded to petitioners' right "to participate and comment," 922 F.2d at 708, Pet A10, betraying the federal frame of reference – are naturally apt to degrade the unfamiliar style of governance in finding it unprotectable, 922 F.2d at 710, Pet A15; or even to suppose that federal adjudication will "correspond" to the State governance lost. 922 F.2d 704, 709 n. 7, Pet A 11 n. 7. The citizen thus loses both the

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[7] *Pennhurst State School & Hosp. v. Halderman*, 465 US 89, 106 (1984).

authority of State governance and, in Florida's case, a particular discipline with law texts which is *not* the accustomed federal judicial method.[8]

• When "the plan of the convention" and the text of Article III require no greater sensitivity to jeopardized sovereign interests, the lenient standards for federal pleading are readily evaded by tissue allegations such as the United States fabricated from law texts and exhibited contracts, *supra* ns. 2, 3 and 4. The United States Attorney exploited other obscurities in its pleading in 1989 to coax and calm the district judge about his designs upon State sovereignty, "The business of putting a numerical limit on total phosphorous, that is within that separate process. . . . We are not asking for a number"; and then to tell the court of appeals, in 1990, the exact opposite: "The only thing that we are concerned with in this lawsuit is a numerical standard for the vegetation in the Park and the Refuge." Noted and quoted by the court of appeals, 922 F.2d 704, 708 f. 6, Pet A8, 9 n. 6. The proposed Settlement Agreement now specifies that Park number at 14 ppb maximum, Sta R41, one-seventeenth the limit agreed to three years before this litigation began, and reserves power in the Technical Oversight Committee to lower the standard still further. Sta R44. The prospect of this sort of scenario in *Littleton v. Berbling*, 468 F.2d 389, 392 (7th Cir. 1972), was entirely disapproved in *O'Shea v. Littleton*, 414 US 488, 495 (1974).

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[8] *E.g., United States v. Little Lake Misere Land Co., Inc.*, 412 US 580, 593 (1973): "[T]he inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts." This of course accounts for the court of appeals all too comfortably describing Florida's "Narrative State Law Standards" in the terms suggested by the United States. 933 F.2d 704, 707, Pet A7.

• The crushing attrition of federal litigation gathers still more power against sovereign State governance and a citizen's interest in its preservation by that remarkable new device, the Settlement Agreement. Without *any significant adjudication* having taken place in the federal district court, the exhausted defendant agencies have now Agreed that the district judge shall have permanent jurisdiction as the authentic power behind the State's governance in this sector.

3.

The States having "entered the federal system with their sovereignty intact," *Blatchford v. Native Village of Noatak*, 111 S.Ct. 2578, 2581 (1991), is it not so that "the judicial authority in Article III is limited by this sovereignty," *Id.*, even when it is the United States who asks a federal judge to compel State governance of a particular sort? It would hardly be of any moment that this Court protects "the usual constitutional balance between the States and the Federal Government" when the power is invoked by an ordinary citizen, *Atascadero State Hosp. v. Scanlon*, 473 US 234, 242 (1984), if the Court is unwilling to read the same Article III as limiting those same powers when invoked by the United States.

Put another way, if Article III constrains this Court to read closely and for plain statements any Act of Congress that a private litigant claims has "alter[ed] sensitive federal-state relationships" in creating his claim for relief, *United States v. Bass*, 404 US 336, 349 (1971), on what principle would Article III not require the same when a United States lawyer who makes the sort of claim as quoted *supra* n. 4? *See also Rice v. Santa Fe Elevator Corp.*, 331 US 218, 230 (1947). Why would the text of a State-United States contract, said to have promised new State regulations having certain

stringencies against targeted citizens, not also be examined for a clear statement of the promise that allegedly creates the Controversy? *Supra* n. 2.

"[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms." *Blatchford*, 111 S.Ct. at 2581. From that understanding, and from the State's "constitutional responsibility for the establishment and operation of its own government," *Sugarman v. Dougall*, 413 US 634, 647 (1973), the Court derived the "clear statement" principles expressed by *Will v. Michigan Dept. of State Police*, 491 US 58, 65 (1989) and *Gregory v. Ashcroft*, 111 S.Ct. 2395 (1991), which guard the integrity of any consent to suit that a State has given "either expressly or in the 'plan of the convention.' " *Blatchford, Id.*

Justice Brennan never accepted that derivation, *e.g. Will v. Michigan Dept. of State Police*, 491 US 58, 71 (1989), and so wrote dicta for a majority (a plurality, excepting Justice Scalia?) in *Pennsylvania v. Union Gas Co.*, 491 US 1, 11 (1989), needlessly in aid of a statutory interpretation, that "there are no special rules dictating when [States] may be sued by the Federal Government," which may be true, and "nor is there a stringent interpretive principle guiding construction of statutes that appear to authorize such suits," which cannot be true unless Article III bespeaks variant meanings of the term Controversies as used by its text.

At any rate this case presents the pure question, is fully mature, and is appropriate for examining "the doctrine of intergovernmental immunity enunciated in *M'Culloch v. Maryland*, 4 Wheat 316, 4 L Ed 579 (1819), however it may have evolved since that decision,"

Rehnquist, J., in *United States v. Little Lake Misere Land Co., Inc.*, 412 US 580, 608 (1973).

United States v. Texas, 143 US 621, 646 (1892) declared the "plan of the convention" to have been as *M'Culloch v. Maryland* described it:

> The submission to judicial solution of controversies arising between these two governments, "each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other," *McCulloch v. State of Maryland* . . . , but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty. The States of the Union have agreed, in the Constitution, that the judicial power of the United States shall extend . . . to controversies to which the United States shall be a party, without regard to the subject of such controversies.

The decisive question is not whether Florida may be sued in a federal court, but what is the duty of that court, in these circumstances, in respect to proceeding upon that alleged "controversy."

These petitioners were entitled to ask the court of appeals to decide whether that litigation could continue without exceeding the Article III limitations. That question is always pertinent, and cannot be boxed into conventional notions of standing, waiver and the like – such as the Brief in Opposition recites. *See Pennsylvania v. Union Gas Co., supra*, 491 US 1, 25-26 (Stevens, J., concurring).

The petition should be granted.

Respectfully submitted,

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